

No. 87-9 DATE: August 27, 1987 EXPIRES: December 31, 1989

CECW-OR

SUBJECT: Section 404(f)(1)(C) Exemption for Construction or Maintenance of Farm or Stock Ponds

1. Section 404(f)(1)(C) of the Clean Water Act (CWA) provides that the discharge of dredged or fill material into waters of the United States for the purpose of construction or maintenance of farm or stock ponds is not prohibited by or otherwise subject to regulation under Section 404, unless the provisions of Section 404(f)(2) are applicable or if a discharge associated with a 404(f)(1)(C) activity contains a toxic pollutant listed under Section 307 of the CWA. Section 404(f)(2) requires permits for those otherwise exempt activities which bring an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced.

2. There is no "ongoing" requirement associated with the Section 404(f)(1)(C) maintenance exemption as in the case of Section 404(f)(1)(A) (although such could be relevant under Section 404(f)(2)). The fact that construction of new ponds as well as the maintenance of existing ponds is specifically exempted under 404(f)(1)(C) indicates that the pond can be lo-

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cated on lands which are part of either a new or ongoing farming/ranching operation. It is equally clear that such ponds must actually be used in the farming/ranching operations. Ponds created for aesthetic or other non-farming related purposes on residential or commercial property do not qualify under this exemption.

3. It is important to consider the relative size of a proposed pond in relation to the size of the farming/ranching operation. A pond is only exempt to the size the farmer requires to meet normal farming operations. A large pond on a small farm could in a few years become the nucleus of a residential development plan and therefore such construction may require an individual permit.

4. For purposes of determining exemptions for the maintenance of existing farm or stock ponds under this provision, the following interpretations will apply:

a. Maintenance means the physical preservation of the original, as built configuration of the pond by placement of clean, upland fill to rebuild existing dikes or levees.

b. Maintenance means the removal of accumulated debris and sediment.

c. Dredged material removed from the pond and discharged in waters of the U.S. must be placed on or immediately contiguous to the original levees/dikes creating the impoundment in order to confine the discharge to the smallest area.

5. For Section 404(f)(2) to apply, the construction or maintenance activity must bring a water into a use to which it was not previously subject *and* impair the flow or circulation or reduce the reach of such waters. Both of these determinations are judgment calls which must be made in a reasonable fashion. It could be argued that one shovelfull of material placed in waters of the U.S. would reduce the reach. Such an argument is not reasonable and would defeat the purpose of the exemption. However, as noted in the legislative history for the 1977 amendments to the CWA, "the exemptions do not apply to discharges that convert extensive areas of water to dry land or impede the circulation or reduce the reach or size of the water body."

6. Discharges associated with construction or maintenance of farm or stock ponds which deepen a presently existing water of the U.S. but do not alter the lateral extent of the original water of the U.S., shall not be deemed as a change in reach for the purpose of Section 404(f)(2).

7. Maintenance which results in a use or purpose different (other than different farming or ranching operations) from the use or purpose following construction of the original pond shall be deemed a new use for the purpose of Section 404(f)(2). A change in farming which involves the conversion from a farming operation occurring in wetlands (e.g., rice or cranberry farming) to upland agriculture is also considered a change in use.

8. This guidance expires 31 December 1989 unless sooner revised or rescinded.

FOR THE CHIEF OF
ENGINEERS:

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